No. 83-2110

In the Supreme Court of the United States

OCTOBER TERM, 1984

CLARKSDALE BAPTIST CHURCH, PETITIONER

v.

WILLIAM H. GREEN, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

MEMORANDUM FOR THE FEDERAL RESPONDENTS IN OPPOSITION

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Petitioner, an intervenor in this action, seeks review of the decision below denying its motion to exclude it and other religious or church-related schools from the scope of an injunction barring tax-exempt treatment of certain private schools in Mississippi in the absence of evidence that those schools do not discriminate against blacks.

1. This suit was instituted in 1969 against the Secretary of the Treasury and the Commissioner of Internal Revenue by the parents of black children attending public schools in Mississippi. It sought declaratory and injunctive relief to change the then-effective policy of the Internal Revenue Service that generally granted tax exemptions to private schools under Section 501(c)(3) of the Internal Revenue

Code of 1954 (26 U.S.C.), as amended (the Code), and allowed charitable deductions for contributions to such schools under Section 170(c)(2) of the Code without regard to the schools' racial policies.

A three-judge district court issued a preliminary injunction against the Secretary and Commissioner in 1970 (*Green* v. *Kennedy*, 309 F. Supp. 1127 (D.D.C.), appeal dismissed *sub nom. Cannon* v. *Green*, 398 U.S. 956 (1970)), and subsequently entered a permanent injunction against the federal officials in 1971 (*Green* v. *Connally*, 330 F. Supp. 1150 (D.D.C.), aff'd *sub nom. Coit* v. *Green*, 404 U.S. 997 (per curiam)). Consistently with those decrees, the Internal Revenue Service published a series of revenue rulings and revenue procedures requiring all private schools to adopt and implement a racially nondiscriminatory policy in order to qualify for administrative recognition of charitable tax status.[1] This Court's decision in *Bob Jones University* v. *United States*, No. 81-3 (May 24, 1983), upheld that position as applied to two private schools whose racially restrictive practices were based on religious beliefs.

In 1976, plaintiff-respondents reopened this case seeking additional relief against the Secretary and Commissioner to carry out and supplement the original judgment. The district court granted such relief in two orders entered on

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[1]See Rev. Rul. 71-447, 1971-2 C.B. 230; Rev. Proc. 72-54, 1972-2 C.B. 834; Rev. Rul. 75-231, 1975-1 C.B. 158; Rev. Proc. 75-50, 1975-2 C.B. 587. In Rev. Rul. 71-447, the Service defined operation under a racially nondiscriminatory policy to mean that "the school admits the students of any race to all the rights, privileges, programs, and activities generally accorded or made available to students at that school and that the school does not discriminate on the basis of race in the administration of its educational policies, admissions policies, scholarship and loan programs, and athletic and other school-administered programs."

May 5, 1980 (Pet. App. 2a-6a) and June 2, 1980 (*id.* at 7a-10a). The 1980 orders directed the Internal Revenue Service not to accord administrative recognition of tax-exempt status for any Mississippi private school that has been determined in other proceedings to be racially discriminatory or that was formed or expanded while nearby public schools were undergoing desegregation, unless there is clear and convincing evidence that the school administers its programs on a racially nondiscriminatory basis. The orders further enjoined the Secretary and Commissioner to conduct a survey of all such private schools in Mississippi, including church-related schools, to determine which, if any, come within the scope of the orders (Pet. App. 6a, 10a).

2. Petitioner operates a religious school in Clarksdale, Mississippi, with an enrollment of 400 students (C.A. App. 147, 152). Its school offers classes through the ninth grade, and meets state accreditation standards for education (*id.* at 91, 119-122, 147). Following the entry of the 1980 orders, the Internal Revenue Service sent questionnaires to petitioner (and to other Mississippi schools) requesting the information contemplated by the orders (*id.* at 144-150). Based on the responses, the Service concluded that petitioner's school was among those formed or expanded at the time that nearby public schools were in the process of desegregation (*ibid.*). Pending further examination, however, the Service has not yet made a final administrative ruling concerning petitioner's continuing qualification for exemption. Thus, petitioner continues to be treated by the Internal Revenue Service as an exempt institution. Because of the absence of final administrative action, petitioner has not brought suit to obtain a judicial determination of its entitlement to tax-exempt status.

3. In May 1981, petitioner was granted leave to intervene in this action (C.A. App. 26). It thereafter moved to modify the 1980 orders on First Amendment grounds, arguing that

they should not apply to the Treasury's determinations regarding church-related schools in Mississippi (*id.* at 85). Plaintiff-respondents filed a motion for summary judgment opposing petitioner's claims (*id.* at 86-87). Following completion of discovery, further proceedings were deferred pending this Court's decision in *Bob Jones University* v. *United States, supra*.[2]

In June 1983, following the *Bob Jones* decision, the district court ordered that the proceedings in this case be resumed and invited the parties to submit briefs on the effect of this Court's ruling (C.A. App. 177-178). On July 22, 1983, after hearing argument, the court denied petitioner's claims for relief and granted judgment in favor of plaintiff-respondents (*id.* at 244-246). The court concluded that petitioner had failed to establish that the Treasury's application of the standards and procedures in the 1980 orders to petitioner's school, or to other religious schools in Mississippi, violated petitioner's statutory or constitutional rights (*ibid.*).

4. Both the court of appeals, on August 18, 1983, and this Court, on October 3, 1983, denied petitioner's applications for a stay pending appeal. Following further briefing, the court of appeals dismissed petitioner's appeal (Pet. App. 1a, 15a). The court found "the First Amendment issues presented by [petitioner] to be plainly insubstantial" (*id.* at 1a). In addition, the court of appeals rejected petitioner's challenge to plaintiffs' standing on the authority of *Wright* v. *Regan*, 656 F.2d 820 (D.C. Cir. 1981) (which decision this Court subsequently reversed *sub nom. Allen* v. *Wright*,

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[2]Plaintiff-respondents' application to lift the stay of proceedings and for further relief against the federal officials was denied by the district court on February 4, 1982. Their petition to this Court for a writ of certiorari before judgment was denied *sub nom. Green* v. *Regan*, 456 U.S. 937 (1982).

No. 81-757 (July 3, 1984)); the court of appeals noted that if its ruling in *Wright* were to be reversed, application could be made to the district court for appropriate relief in this case (Pet. App. 1a).

5. The courts below correctly denied petitioner's motion to have the outstanding injunction modified on First Amendment grounds. This Court's recent decision in *Bob Jones University* v. *United States, supra,* establishes the authority of the Internal Revenue Service to examine the policies and practices of tax-exempt religious schools in order to determine whether their admissions, hiring, and other school programs are administered in a racially nondiscriminatory fashion. Furthermore, as the district court observed (C.A. App. 235), the injunction in this case does not prevent petitioner from "giv[ing] religious preference" in the operation of its school and bars it only from discriminating on the basis of race. That interpretation accords with the Service's own published procedures, which seek to accommodate schools that select students on the basis of membership in particular religious denominations. See § 3.03, Rev. Proc. 75-50, 1975-2 C.B. 587.

Moreover, it is significant that petitioner's own tax status is not directly in issue here. As the district court pointed out (C.A. App. 220-224), the injunctive orders are addressed to the administrative actions of officials of the Treasury; the orders do not purport to control any school's ultimate right to an exemption. A final ruling on petitioner's continuing qualification for tax-exempt status has yet to be made by the Internal Revenue Service. Should the Service determine to withdraw recognition of petitioner's exemption, petitioner would be entitled to judicial review in a declaratory action under Section 7428 of the Code or in a tax refund suit. See *Bob Jones University* v. *United States,* slip op. 6,

8.[3] Petitioner will thus have adequate opportunity in a future proceeding to present evidence and raise arguments bearing on its claim to a tax exemption, if such litigation becomes necessary. But that question is prematurely presented here. Indeed, in *Bob Jones University* v. *Simon*, 416 U.S. 725 (1974), the earlier suit by Bob Jones University seeking to enjoin the Commissioner from taking final administrative action to revoke its exemption, this Court held that the Anti-Injunction Act of the Internal Revenue Code (26 U.S.C. 7421(a)) prohibited the University from obtaining judicial review of its own tax status before the Commissioner issued his final administrative ruling. The current injunction suit similarly may not serve as an extra-statutory vehicle for resolution of exemption claims pressed by individual schools prior to final IRS action. Accordingly, further review in this case is not warranted.[4]

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[3]Contributors might also be able to obtain judicial review in the event that the Commissioner were to deny their claims to charitable deductions for gifts to petitioner.

[4]There is no need for this Court to consider petitioner's contention that plaintiff-respondents lacked standing to sue. No relief has been ordered against petitioner in this case, and the opinion below already specifies (Pet. App. 1a) that the standing question may be reopened in the district court. (Petitioner's standing contention obviously is in considerable tension with its effort to use this case as a vehicle for adjudication of the other questions it seeks to present.)

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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AUGUST 1984

DOJ-1984-08